

**Bernstein-Burkley, P.C.**  
**Keri P. Ebeck, Esquire**  
**Bar No. 262092017**  
**601 Grant Street, 9<sup>th</sup> Floor**  
**Pittsburgh, PA 15219**  
**(412) 456-8112**

*Attorneys for Realty Income Corporation*

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY**

In re:

BED BATH & BEYOND, INC., et al.

Debtors<sup>1</sup>

Chapter 11

Case No. 23-13359 (VFP)

Judge: Hon. Vincent F. Papalia

**LIMITED OBJECTION OF REALTY INCOME CORPORATION  
TO POTENTIAL ASSUMPTION AND ASSIGNMENT OF  
UNEXPIRED LEASE AND RESERVATION OF RIGHTS**

Realty Income Corporation (“Realty Income” or “Landlord”), by and through its counsel, hereby files this limited objection to the *Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* [Docket No. 714] (“Notice”), and in support hereof states as follows:

**Background**

1. On or about April 24, 2023 (“Petition Date”), each of the above-captioned debtors (collectively, the “Debtors”) filed voluntary petitions under chapter 11 of title 11 of the United States Code (“Bankruptcy Code”) with this Court.

---

<sup>1</sup> The last four digits of Debtor Bed Bath & Beyond Inc.’s tax identification number are 0488. A complete list of the Debtors in these Chapter 11 Cases and each such Debtor’s tax identification number may be obtained on the website of the Debtors’ claims and noticing agent at <https://restructuring.ra.kroll.com/bbby>. The location of Debtor Bed Bath & Beyond Inc.’s principal place of business and the Debtors’ service address in these Chapter 11 Cases is 650 Liberty Avenue, Union, New Jersey 07083.

2. The Debtors are operating their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On June 13, 2023, the Debtors filed the Notice which states that, “pursuant to the Bidding Procedures and the terms of any Successful Bid, the Debtors may assume and assign to the Successful Bidder the contract or agreement listed on Exhibit A to which you are a counterparty, upon approval of the Sale Transaction.” Notice, p.2 (emphasis in original).<sup>2</sup> The Notice further provides that any objection to the “proposed Cure Payment”, the “proposed assignment to the Successful Bidder”, or “the ability of the Successful Bidder to provide adequate assurance of future performance” must be filed no later than June 26, 2023 at 5:00 p.m. (prevailing Eastern Time). *Id.*

4. Exhibit A to the Notice includes leases (collectively, the “Leases”) with Realty Income for four (4) premises (collectively, the “Premises”), described in the Notice as follows:

- “Lease Agreement – 5802 Grape Road Suite B, Mishawaka, IN” (“Lease 1”): Exhibit A to the Notice identifies Realty Income Properties 27, LLC as the counterparty and asserts that the proposed Cure Payment for the subject lease is **\$0**.
- “Lease Agreement – 12035 Metcalf Ave., Overland Park, KS” (“Lease 2”): Exhibit A to the Notice identifies MDC Coastal I, LLC as the counterparty and asserts that the proposed Cure Payment for the subject lease is **\$93.72**.
- “Lease Agreement – 12055 Metcalf Ave., Overland Park, KS” (“Lease 3”): Exhibit A to the Notice identifies MDC Coastal I, LLC as the counterparty and asserts that the proposed Cure Payment for the subject lease is **\$0**.

---

<sup>2</sup> Capitalized terms in the Notice have the meanings set forth in the Court’s order approving bidding procedures [Docket No. 92] (the “Bidding Procedures Order”).

- “Lease Agreement – 1050 McKinley Place Drive, San Marcos, TX” (“Lease 4”): Exhibit A to the Notice identifies VEREIT, Inc. as the counterparty and asserts that the proposed Cure Payment for the subject lease is **\$0**.

5. In addition, on May 22, 2023, this Court entered the *Order (I) Establishing Procedures to Sell Certain Leases, (II) Approving the Sale of Certain Leases, and (III) Granting Related Relief* [Docket No. 422] (“Lease Sale Procedures Order”). The Lease Sale Procedures Order approves, among other things, additional sale procedures related to the Debtors’ potential “Phase I” and “Phase II” sale of leases, and expressly permits landlords to submit bids in connection with their leases, including credit bids of their undisputed cure amounts.

### **Preliminary Objection**

#### **a. Proposed Cure Payment**

6. The Debtors set the proposed Cure Payment at \$93.72 relating to Lease 2 only and sets the proposed Cure Payment at \$0 for all other Leases. Realty Income asserts that the correct cure amount for the Leases, as of the date of filing this limited objection, is **\$481,354.91** (“Correct Cure Amount”), which includes common area maintenance (CAM) charges, property tax and insurance obligations due under the Leases.

7. The Correct Cure Amount consists of unpaid prepetition and postpetition amounts owed under the Leases. The unpaid prepetition amounts equal \$152,594.78 and unpaid postpetition amounts equal \$328,760.13 (including amounts coming due on July 1, 2023). These amounts are delineated below.

Location/Lease	Prepetition Amounts	Postpetition Amounts
5802 Grape Rd. Mishawa, IN (Lease 1)	\$00.00	\$32,238.56 (tax reimbursement due May 1, 2023) \$274.29 (CAM reconciliation and escrows due June 1, 2023) \$3,837.02 (CAM escrows due June 1, 2023) \$36,773.93 (rent comes due July 1, 2023)
12035 Metcalf Ave. Overland Park, KS (Lease 2)	\$39,333.08 (rent due April 1, 2023) \$4,408.88 (CAM escrows due April 1, 2023)	\$87,802.83 (tax reimbursement due on May 1, 2023) \$4,408.88 (CAM escrows comes due July 1, 2023) \$55,239.25 (rent comes due on July 1, 2023)
12055 Metcalf Ave. Overland Park, KS (Lease 3)	\$20,836.01 (rent due April 1, 2023) \$4,364.96 (CAM escrows due June 1, 2023)	\$52,659.22 (tax reimbursement due May 1, 2023) \$4,364.96 (CAM escrows to comes due July 1, 2023) \$31,875.00 (rent comes due July 1, 2023)
1050 McKinley Pl. San Marcos, TX (Lease 4)	\$123.91 (CAM reconciliation for 1/22 – 12/22) \$58,821.24 (tax reimbursement due March 1, 2023) \$1,407.77 (water/sewer due March 1, 2023) \$1,717.17 (insurance reconciliation) \$2,295.57 (CAM escrows due March 1, 2023) \$1,754.09 (CAM escrows due April 1, 2023) \$282.10 (insur. escrow due April 1, 2023) \$17,250.00 (rent due April 1, 2023)	\$1,754.09 (CAM escrows due July 1, 2023) \$282.10 (insurance escrow comes due July 1, 2023) \$17,250.00 (rent comes due July 1, 2023)

The unpaid postpetition amounts are as follows:

8. If the Lease is to be assumed or assumed and assigned, the Debtors or the assignee should be required to pay Realty Income the Correct Cure Amount in accordance with section 365(b) of the Bankruptcy Code, together with any other amounts accruing under the Leases (including without limitation any fixed rent or percentage rent, and applicable taxes, common areas charges, and insurance costs) in accordance with the terms

of the Leases between the date of this filing and the date that the Leases are actually assumed or assumed and assigned.

**b. Adequate Assurance of Future Performance**

9. In addition, Realty Income is entitled to adequate assurance of future performance by any assignee under section 365(f)(2)(B) of the Bankruptcy Code. As a shopping center lease, this also requires satisfaction of the provisions of section 365(b)(3). Section 365(b)(3) specifically requires adequate assurance:

- (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
- (B) that any percentage rent due under such lease will not decline substantially;
- (C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement related to such shopping center; and
- (D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

*11 U.S.C. § 365(b)(3).*

10. Realty Income objects to the extent any proposed assignment of the Leases fails to comply with any of the foregoing requirements under section 365(b)(3) of the

Bankruptcy Code. This shall include any resulting violations of any of the terms and conditions of the Leases.<sup>3</sup>

11. If the Leases are to be assumed or assumed and assigned, the Debtors or Overstock.com should also be required to pay Realty Income a “deposit or other security for the performance of the [Debtors’] obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant” in accordance with section 365(l) of the Bankruptcy.

### **Reservation of Rights**

12. Realty Income further reserves the right to amend and/or supplement this objection and the Correct Cure Amount. Further, while the Lease Sale Procedures Order is not referenced in the Notice, Realty Income further reserves all rights with respect thereto. All objections and reservations asserted herein apply with equal force to any proposed sale, assumption or assignment under the Lease Sale Procedures Order, to the extent applicable.

### **Conclusion**

**WHEREFORE**, Realty Income respectfully requests that the Court sustain this preliminary objection by conditioning assumption and assignment of the Leases on: (1) the payment to Realty Income of the Correct Cure Amount plus any other amounts accruing under the Leases between the date of this filing and the date that the Leases are actually assumed or assumed and assigned; and (2) adherence to the provision of adequate

---

<sup>3</sup> Note that the documents evidencing and governing the Leases are voluminous and are in the possession of Debtors. They will also be made available upon request.

assurance of future performance, including without limitation as required by section 365(b)(3) of the Bankruptcy Code, and grant any other and further relief that the Court may deem appropriate.

Respectfully submitted,

Dated: June 26, 2023

**BERNSTEIN-BERKLEY, P.C.**

By: /s/ Keri P. Ebeck  
Keri P., Ebeck, NJ ID No. 262092017  
[kebeck@bernsteinlaw.com](mailto:kebeck@bernsteinlaw.com)  
601 Grant Street, 9<sup>th</sup> Floor  
Pittsburgh, PA 15219  
Telephone: 412-456-8112  
Fax: 412- 456-8135

*Attorneys for Realty Income Corporation*

-and-

**HEMAR, ROUSSO & HEALD LLP**

By: /s/ J. Alexandra Rhim  
15910 Ventura Blvd., 12th Floor  
Encino, CA 91436  
Telephone: 818-501-3800  
Fax: 818-501-2985  
J. Alexandra Rhim, Esq.  
[arhim@hrhlaw.com](mailto:arhim@hrhlaw.com)  
(Pro Hac Vice Application Pending)  
*Attorneys for Realty Income Corporation*